Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

CALVARY BAPTIST CHURCH and
REVEREND JERRY MCDONALD,

Plaintiffs-Petitioners,

vs.

OKLAHOMA DEPARTMENT OF HUMAN SERVICES and
BENJAMIN DEMPS, JR. in his capacity as the Director
of the Oklahoma Department of Human Services,

Defendants-Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Child Care Facilities Licensing Act is impermissibly vague under the Fourteenth Amendment to the United States Constitution so that its application to a religious boarding academy inhibits the exercise of First Amendment freedoms of the church which operates the academy as part of its total religious ministry.

PARTIES TO THE PROCEEDING ON REVIEW

The plaintiffs-petitioners to the proceedings in which judgment is sought to be reviewed were:

1. Calvary Baptist Church, an Oklahoma non-profit religious corporation, and
2. Reverend Jerry McDonald, Paster of Calvary Baptist Church.

The defendants-respondents to the proceeding were:

1. Oklahoma Department of Human Services and
2. Benjamin Demps, Jr., in his capacity as the Director of the Oklahoma Department of Human Services.

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OPINIONS DELIVERED IN THE COURTS BELOW

The order of the Oklahoma Supreme Court denying Plaintiffs' petition for certiorari for *Calvary Baptist Church and Reverend Jerry McDonald v. Oklahoma Department of Human Services and Benjamin Demps, Jr., in his capacity as Director of the Oklahoma Department of Human Services,* is unreported, but is printed in the Appendix at page App. 18, *infra.* The Oklahoma Court of Appeals Memorandum Opinion for *Calvary Baptist Church and Reverend Jerry McDonald v. Oklahoma Department of Human Services and Benjamin Demps, Jr., in his capacity as Director of the Oklahoma Department of Human Services,* is also unreported and is printed in the Appendix beginning at page App. 19, *infra.* The Pittsburg County, Oklahoma, District Court Order in *Calvary Baptist Church and Reverend Jerry McDonald v. Oklahoma Department of Human Services and Benjamin Demps, Jr., in his capacity as Director of the Oklahoma Department of Human Services,* is also unreported and is printed in the Appendix beginning at page App. 27, *infra.*

JURISDICTION OF THIS COURT

This Petition of Writ of Certiorari seeks review of the judgment of the Oklahoma Supreme Court entered on January 12, 1994, denying the petition for writ of certiorari in *Calvary Baptist Church and Reverend Jerry McDonald v. Oklahoma Department of Human Services and Benjamin Demps, Jr., in his capacity as Director of the Oklahoma Department of Human Services.*

Supreme Court jurisdiction to review this decision is conferred in 28 U.S.C. §1257 in that the validity of a state

statute is drawn into question as being a violation of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Fourteenth Amendment, Section One:

> All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where in they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Oklahoma Constitution, Article 1, § 5:

> Provisions shall be made for the establishment and maintenance of a system of public school, which shall be open to all the children of the state and free from sectarian control; and said schools shall always be conducted in English; Provided, that nothing herein shall preclude the teaching of other languages in said public schools. Oklahoma Constitution, Article 1, § 5.

Oklahoma Constitution, Article 13, § 4:

> The Legislature shall provide for the compulsory attendance at some public or other school, unless other means of education are provided, all of the children in the State who are sound in mind and body, between the ages of

eight and sixteen years, for at least three months in each year.

10 Okla. Stat. 402(4)

"Full-time care" means continuous care given to a child beyond a minimum period of Twenty-four (24) hours. A "foster family home" is a family home other than the parent, stepparent, grandparent, brother, sister, uncle, or aunt, which provides full-time care for five or less children; and all other such homes providing full-time care for more than five children shall be considered as "group homes." The term "day care" as used in this act shall mean the provision of care and supervision of a child who resides in its own home or with relatives but is in the care of another person for part of the day who is conducting a family day care home or persons conducting a day care center. A "family day care home" means a licensed or approved family home which provides care and protection for five or less children for part of the twenty-four-hour day. A "day care center" means a licensed or approved facility which provides care and protection of six or more children for a part of the twenty-four-hour day. These definitions of family day care home and day care center do not include informal arrangements which parents make independently with neighbors, friends, and others, caretakers in the child's own home, and do not include nursery schools, kindergartens or other facilities of which the purpose is primarily educational, recreational, or medical treatment.

10 Okla. Stat. 403(a)

> The provisions of this act shall not apply to licensed hospitals, maternity homes, to schools under the supervision of the Department of Education, the home of a child maintained by his parent, stepparent, grandparent, brother, sister, uncle or aunt.

10 Okla. Stat. 410

> [a]ny person or agent, representative, or officer of any child care facility who violates any of the provisions of this act shall, upon conviction, be deemed guilty of a misdemeanor and punished in accordance with the provisions of 21 Okla. Stat. § 10.

STATEMENT OF THE CASE

On September 22, 1987, the Pittsburg County, Oklahoma, District Court ordered that a permanent injunction be issued against Reverend Jerry McDonald and Calvary Boys Ranch, a rehabilitative home for children operated by the Calvary Baptist Church, prohibiting them from operating the Ranch, or any other "child care facility" without first having obtained a license to do so from the Department of Human Services as required by Oklahoma Child Care Facilities Licensing Act, 10 O.S. §§ 401-410.

On November 18, 1990, after this Court denied the petition for certiorari of Reverend McDonald and Calvary Boys Ranch (*State v. McDonald*, 498 U.S. 817 (1990)), Calvary Baptist Church, which operated the Ranch as part of its total religious ministry, voted to close the Ranch ministry. On that same date, the Church voted to expand its Calvary Christian Academy ministry, a Christian day

school which had been in operation since 1979, to include a boarding school. The parents of the boys at the Ranch were instructed to remove their sons from the Ranch.

Enrollment at the Calvary Christian Boarding Academy began on January 4, 1991. On March 22, 1991, the Department of Human Services notified Rev. Jerry McDonald and Calvary Christian Boarding Academy that it was in violation of 1987 Court Order and that operations must cease until the Boarding Academy was licensed by the Department.

A declaratory judgment action was filed in the Pittsburg County District Court, on April 8, 1991, by Rev. McDonald and Calvary Baptist Church asking for a declaration that neither the Child Care Facilities Licensing Act nor the prior injunctive order require that the Calvary Christian Boarding Academy is a violation of due process rights of the Plaintiffs as guaranteed by the United States Constitution.

After trial the Court found that the Boarding Academy is a primarily educational service to emotionally stable students, as opposed to the Ranch which had been a primarily rehabilitative service to hard core delinquents (Findings of Fact 3 and 4, Conclusion of Law 1, at App. 29-30, 33). The Court further found that the Department of Human Services does not have clear directive to distinguish between a child care facility that provides education from an education facility that provides child care and that such a standard that is subjective and based on the knowledge and personal experience of a particular employee is not acceptable (Findings of Fact 14, at App. 32-33). The District Court therefore concluded as a matter

of law that the Child Care Facilities Licensing Act is impermissibly vague in its failure to set up standards or definitions for the determination of what is an educational facility (Conclusion of Law 6, at App. 30). The Court then declared that the Calvary Christian Boarding Academy is not subject to the prior injunctive order and that it is not required to obtain a license under the provisions of the Child Care Facilities Licensing Act in order to operate.

Upon appeal, the Oklahoma Court of Appeals, in an unpublished Memorandum Opinion (beginning at App. 19), reversed the trial court, holding that the Child Care Facilities Licensing Act is not impermissibly vague. The Court further held that the trial court erred in granting judgment to the Church and reversed the lower court's order holding the boarding academy not subject to the licensing requirements of the Child Care Facilities Licensing Act.

The Oklahoma Supreme Court denied the Church's petition for certiorari on January 12, 1994. (App. 18). It is that judgment which is the subject of this petition.

REASON FOR GRANTING THE WRIT

The courts below failed to follow this court's direction in their consideration of requirements of the Child Care Facilities Licensing Act of the State of Oklahoma.

The Oklahoma Child Care Facilities Licensing Act is codified at Okla. Stat. 10 § 401 *et seq.* Section 405 requires

a license for operation every child care facility from the Department of Human Services.

The exclusions of the Act are found at 10 Okla. Stat. Ann. § 402(4).

> 'Full time care' means continuous care given to a child beyond a minimum period of twenty-four (24) hours. A 'family day care home' means a licensed or approved family home which provides care and protection for five or less children for *part* of the twenty-four-hour day. A 'day care center' means a licensed or approved facility which provides care and protection of six or more children for a part of the twenty-four-hour day. These definitions of family day care home and day care center do not include informal arrangements which parents make independently with neighbors, friends, and others, caretakers in the child's own home, *and* do not include nursery schools, kindergartens, or *other facilities of which the purpose is primarily educational, recreational, or medical treatment.* (emphasis added.)

Section 403(a) sets out the exemption from the CCFLA.

The provisions of this act shall not apply to licensed hospitals, maternity homes, to schools under the supervision of the Department of Education, the home of a child maintained by his parent, stepparent grandparent, brother, sister, uncle or aunt.

Section 410 provides for the imposition of criminal sanctions upon conviction of a violation of any of the provisions of this Act, providing that

> [a]ny person or agency, representative, or officer of any child care facility who violates any of the provisions of this act shall, upon conviction, be deemed guilty of a misdemeanor and punished in accordance with the provisions of 21 Okla. Stat. § 10.

The provisions of 21 Okla. Stat. § 10 provide for punishment by imprisonment in the county jail not exceeding one year or by a fine not exceeding $500, or both.

As found by the trial court, the provisions of this Act to Petitioners do not sufficiently delineate the standards under which they may face potential criminal liability. Its application has been "subjective and based on the knowledge and personal experience of a personal employee." (Finding of Fact 14, App. 32). When, as does this Act, First Amendment rights are implicated, such a failure of standards becomes unconstitutionally vague under the Fourteenth Amendment to the United States Constitution.

The elements of vagueness are set forth in this Court's decision of *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The Court held:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First . . . we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited . . . Second . . . [a] vague law impermissibly delegates basic policy matters to policemen, judges and juries . . . with the attendant dangers of arbitrary and discriminatory application. Third . . . a vague statute, 'abuts upon sensitive

> areas of basic First Amendment freedoms' [and] it 'operates to inhibit the exercise of those freedoms.' *quoting Baggett v. Bullitt*, 377 U.S. 360, 372 and *Cramp v. Board of Public Instruction*, 368 U.S. 278.

Elaborating on the standards enunciated in *Grayned*, the Supreme Court recently upheld a constitutional challenge to a loitering statute in *Kolender v. Lawson*, 461 U.S. 352 (1983). The Court stated that "the more important aspect of the vagueness doctrine 'is not actual notice, but . . . the requirement that a legislature establish minimal guidelines to govern law enforcement.' " *Id.* at 358. The Court recognized the dangers that are inherent in vesting an inordinate amount of discretion in the hands of law enforcement personnel and/or the judiciary.

The analysis used with regard to a law that has been challenged for vagueness is even more strict when the statute in question implicates consideration of fundamental First Amendment rights such as the regulation of a Church operated religious ministry. In *Smith v. Goguen*, 415 U.S. 566, 573 & n. 10 (1974), the Court stated that "[w]here a statue's literal scope . . . is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.'

In *NAACP v. Button*, 371 U.S. 415 (1963), the Court ruled that a section of Virginia's statutory regulation of attorney conduct was unconstitutionally vague. The Court addressed the issue of vagueness when it held that "[t]he objectional quality of vagueness and overbreadth [depends] . . . upon the danger of tolerating, in the area of

First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *Id.* at 433.

The Court noted that a vagueness challenge to a statute need not have as its base a criminal prosecution. Further, the Court delineated the presumption to be used when analyzing such challenges when it stated:

> [W]e will not presume the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expansion. *Id.* at 432.

As the trial court noted, several of the Act's key terms are not defined. Nowhere in the Act are there standards articulated "primarily educational, recreational or medical treatment." This phrase as it relates to this Act has not been judicially interpreted. Additionally, as noted above, the Act carries criminal sanctions for the violation of any of its provisions. Such an utter lack of guidance leaves Petitioners and other similarly situated litigants subject to the possibility of criminal sanctions with no clear idea of whether their conduct is within the scope of the Act.

As the trial court found, the Department has "no clear directives to distinguish between a Child Care Facility that provide education from an Educational Facility that provides child care." That has left the unacceptable position in the state of leaving the standards to the subjective personal experience of a particular employee. It is the possibility of such ad hoc determinations that allow

enforcement personnel to act out of their individual predilections that were found to be constitutionally invalid in prior Court decisions.

In its analysis of the Act as it relates to the Boarding Academy of the Calvary Baptist Church, the Oklahoma Court of Appeals, the highest state court which issued a memorandum opinion, the Court failed to take into consideration the requirements of the Court in a vagueness challenge. It ignored the finding of fact of the trial court that Department is presently enforcing the provisions of the Child Care Facilities Licensing Act, as applied to boarding facilities which are primarily education in nature, by a subjective standard based on the knowledge and personal experience of a particular employee. It also ignored the trial court's conclusion that the Act is devoid of standards or definitions of what is an educational facility.

Petitioner Church complied with the injunctive order issued against it in 1987 and closed the Calvary Boys Ranch, turning away boys, many of them from literally off the streets of America, which no one else could help. Instead, it expanded its Christian Academy ministry to include a boarding division, believing it would have no difficulty in doing so, since the State of Oklahoma has permitted the operation of its Christian Academy since 1979. It was led to this conclusion since the Act does not appear to regulate a primarily religious educational facility such as a Christian school. They then learned that operation of the Boarding Academy subjects them to criminal sanctions.

It is just such a result that the vagueness doctrine as developed by this Court under the Fourteenth Amendment is meant to avoid.

CONCLUSION

The Court of Appeals has decided that the State of Oklahoma may chill the due process rights of its citizens by applying vague enforcement standards to boarding educational facilities at the subjective will of the employees of the Department of Human Services. This subjective enforcement of a criminal provision is in violation of the standards enunciated by this Court under the Fourteenth Amendment to the United States Constitution. Petitioners therefore respectfully pray that a writ of certiorari issue to review the judgment of the Oklahoma Supreme Court, which denied certiorari to the Petitioners below.

Respectfully submitted,

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APPENDIX

OK CONST Art. 1, § 2

§ 2. Religious liberty – Polygamous or plural marriages

Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship; and no religious test shall be required for the exercise of civil or political rights. Polygamous or plural marriages are forever prohibited.

OK CONST Art 1, § 5

§ 5. Public schools

Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and free from sectarian control; and said schools shall always be conducted in English: Provided, that nothing herein shall preclude the teaching of other languages in said public schools.

OK CONST Art 2, § 7

§ 7. Due process of law

No person shall be deprived of life, liberty, or property, without due process of law.

OK CONST Art 13, § 1

§ 1. Establishment and maintenance of public schools

The Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated.

OK CONST Art. 13, § 4

§ 4. Compulsory school attendance

The Legislature shall provide for the compulsory attendance at some public or other school, unless other means of education are provided, of all the children in the State who are sound in mind and body, between the ages of eight and sixteen years, for at least three months in each year.

OK CONST Art. 13, § 5

§ 5. Board of education

The supervision of instruction in the public schools shall be vested in a Board of Education, whose powers and duties shall be prescribed by law. The Superintendent of Public Instruction shall be President of the Board. Until otherwise provided by law, the Governor, Secretary of State, and Attorney General shall be ex-officio members, and with the Superintendent, compose said Board of Education.

OKLAHOMA STATUTES

TITLE 70

DIVISION I.
SCHOOL CODE

OK STAT. 70 § 1-103

§ 1-103. Act to be liberally construed

If any section or part of the Oklahoma School Code is found to be ambiguous or otherwise subject to more than

one interpretation, such section shall be liberally construed to the extent that the general purpose of the entire Code and of public education may be advanced.

OK STAT. 70 § 1-105

§ 1-105. State Department of Education – State Board of Education – State Superintendent of Public Instruction – Definitions

A. The State Department of Education is that department of the state government in which the agencies created or authorized by the Constitution and Legislature are placed and charged with the responsibility of determining the policies and directing the administration and supervision of the public school system of the state. These agencies are the State Board of Education, the State Superintendent of Public Instruction and such divisions and positions as may be established by law and by the State Board of Education.

B. The State Board of Education is that agency in the State Department of Education which shall be the governing board of said Department and the public school system of the state.

C. The State Superintendent of Public Instruction is the official provided for in Article VI, Section 1, of the Constitution of Oklahoma who shall be the executive officer of the State Board of Education.

OK STAT. 70 § 1-106

§ 1-106. Public schools – Definition – What included

The public schools of Oklahoma shall consist of all free schools supported by public taxation and shall include nurseries, kindergartens, elementary, which may include either K-6 or K-8, and secondary schools, not to exceed two (2) years of junior college work, night schools, adult and other special classes, vocational and technical instruction and such other school classes and instruction as may be supported by public taxation or otherwise authorized by laws which are now in effect or which may hereafter be enacted.

OK STAT. 70 § 1-121

§ 1-121. Conflicting provisions

The provisions of this act shall control over any conflicting provisions in the laws of this state.

OK STAT. 70 § 10-105

§ 10-105. Neglect or refusal to compel child to attend school – Exceptions

A. It shall be unlawful for a parent, guardian, or other person having custody of a child who is over the age of five (5) years, and under the age of eighteen (18) years, to neglect or refuse to cause or compel such child to attend and comply with the rules of some public, private or other school, unless such child has been screened as provided for in Section 1210.282 of this title and such child is determined not to be ready for kindergarten, or a

parent, guardian, or other person having custody of the child, provides by certified mail prior to enrollment or at any time during that first year, notification of election to withhold the child from kindergarten until the next school year after the child is six (6) years of age, or unless other means of education are provided for the full term the schools of the district are in session. One-half (1/2) day of kindergarten shall be required of all children five (5) years of age or older as appropriately provided for by Section 1210.282 of this title, or as otherwise excepted from same by this section. A kindergarten program shall be directed toward developmentally appropriate objectives for such children. The program shall require that any teacher employed on and after January 1, 1993, to teach a kindergarten program within the public school system shall be certified in early childhood education. All teachers hired to teach a kindergarten program within the public school system prior to January 1, 1993, shall be required to obtain certification in early childhood education on or before the 1996-97 school year in order to continue to teach a kindergarten program.

B. It shall be unlawful for any child who is over the age of sixteen (16) years and under the age of eighteen (18) years, and who has not finished four (4) years of high school work, to neglect or refuse to attend and comply with the rules of some public, private or other school, or receive an education by other means for the full term the schools of the district are in session.

Provided, that this section shall not apply:

1. If any such child is prevented from attending school by reason of mental or physical disability, to be determined by the board of education of the district upon a certificate of the school physician or public health physician, or, if no such physician is available, a duly licensed and practicing physician;

2. If any such child is excused from attendance at school, due to an emergency, by the principal teacher of the school in which such is enrolled, at the request of the parent, guardian, custodian or other person having control of such child;

3. If any such child who has attained his or her sixteenth birthday is excused from attending school by written, joint agreement between

a. the school administrator of the school district where the child attends school, and b. the parent, guardian or custodian of the child. Provided, further, that no child shall be excused from attending school by such joint agreement between a school administrator and the parent, guardian or custodian of the child unless and until it has been determined that such action is for the best interest of the child and/or the community, and that said child shall thereafter be under the supervision of the parent, guardian or custodian until the child has reached the age of eighteen (18) years; or

4. If any such child is excused pursuant to subsection C of this section.

C. A school district shall excuse a student from attending school for the purpose of observing religious holy

days if before the absence, the parent, guardian, or person having custody or control of the student submits a written request for the excused absence. The school district shall excuse a student pursuant to this subsection for the days on which the religious holy days are observed and for the days on which the student must travel to and from the site where the student will observe the holy days.

D. It shall be the duty of the attendance officer to enforce the provisions of this section. Any parent, guardian, custodian, child or other person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than Five Dollars ($5.00) nor more than Twenty-five Dollars ($25.00) for the first offense, not less than Ten Dollars ($10.00) nor more than Fifty Dollars ($50.00) for the second offense, and not less than Twenty-five Dollars ($25.00) nor more than One Hundred Dollars ($100.00) for each subsequent offense. Each day the child remains out of school after the written warning has been given or the child has been ordered to school by the juvenile court may constitute a separate offense. At the trial of any person charged with violating the provisions of this section, the attendance records of the child or ward may be presented in court by any authorized employee of the school district.

Oklahoma Statutes

CHAPTER 18

OKLAHOMA CHILD CARE FACILITIES LICENSING ACT

§ 401. Purpose and policy of law – Minimum standards

(a) It is the declared purpose and policy of this act, same to be known as the "Oklahoma Child Care Facilities Licensing Act," to insure maintenance of minimum standards for the care and protection of children away from their own homes, to encourage and assist the child care facility toward maximum standards, and to work for the development of sufficient and adequate services for child care through joint work of public and voluntary agencies. Whenever possible, child care facilities should help to preserve and restore family life for children.

(b) In order to provide care for children in child care facilities, a license shall be obtained from the Department of Public Welfare, which is issued on the basis of meeting minimum standards which are essential for the health and welfare of the child or children placed for care with such agencies and individuals.

Laws 1953, p. 17, § 1. Laws 1963, c. 89, § 1, eff. May 23, 1963.

§ 402. Definitions

As used in this act:[1]

1. "Child" or "minor" means any person who has not attained the age of eighteen (18).

2. "Child care facility" means any public or private institution, child placing agency, foster family home, group home, day care center, or family day care home, providing either full-time or part-time care for children away from their own homes, and which is owned or controlled by a political subdivision, a corporation, an unincorporated organization or association, or individual.

3. "Child placing agency" means a child welfare agency licensed to place children in foster family homes, group homes or adoptive homes.

4. "Full-time care" means continuous care given to a child beyond a minimum period of twenty-four (24) hours. A "foster family home" is a family home other than the parent, stepparent, grandparent, brother, sister, uncle, or aunt, which provides full-time care for five or less children; and all other such homes providing full-time care for more than five children shall be considered as "group homes". The term "day care" as used in this act shall mean the provision of care and supervision of a child who resides in its own home or with relatives but is in the care of another person for part of the day who is conducting a family day care home or persons conducting a day care center. A "family day care home" means a

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[1] Section 401 et seq. of this title.

licensed or approved family home which provides care and protection for five or less children for part of the twenty-four-hour day. A "day care center" means a licensed or approved facility which provides care and protection of six or more children for a part of the twenty-four-hour day. These definitions of family day care home and day care center do not include informal arrangements which parents make independently with neighbors, friends, and others, caretakers in the child's own home, and do not include nursery schools, kindergartens, or other facilities of which the purpose is primarily educational, recreational, or medical treatment.

5. "Department" means the Department of Human Services.

6. "Commission" means the Oklahoma Public Welfare Commission, the policy-making and general supervisory body of the Department.

7. "Division" means the division of the Department of Human Services of the State of Oklahoma assigned responsibilities pursuant to the provisions of the Oklahoma Child Care Facilities Licensing Act.[2]

Laws 1953, p. 18, § 2. Laws 1963, c. 89, § 2, eff. May 23, 1963; Laws 1986, c. 263, § 2, operative July 1, 1986.

§ 403. Exemptions from application of act

(a) The provisions of this act shall not apply to licensed hospitals, maternity homes, to schools under the supervision of the Department of Education, the home of

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[2] Section 401 et seq. of this title.

a child maintained by his parent, stepparent, grandparent, brother, sister, uncle or aunt.

(b) The provision of this act shall be equally incumbent upon all private and public child care facilities. Provided, that any institution furnishing full-time care for children for ten (10) years prior to the effective date of this act shall, upon written notification to the Department, be exempted from the provisions of this act, if it is not receiving any state or federal funds for furnishing food, clothing, shelter, or upkeep for such children; and provided, further, that any institution being operated by a war veterans' organization and furnishing full-time care for children on the effective date of this act shall be exempted from the provisions of this act, regardless of whether it is receiving state or federal funds.

Laws 1953, p. 18, § 3. Laws 1963, c. 89, § 3, eff. May 23, 1963.

§ 404. Minimum requirements and desirable standards

(a) The Department shall appoint advisory committees of representatives of child care facilities and others to prepare minimum requirements and desirable standards for adoption by the Department, provided that a majority of any committee appointed to prepare requirements and standards for institutions and homes shall be representatives of voluntary, nonprofit child care institutions and homes. These standards shall include requirements for a constructive program and services to meet the needs of each child and family; staff or good moral character and

ability for child care; adequate and safe housing, sanitation, and equipment; good health care; full educational and religious opportunities; good community relationships; essential records and administrative methods; and sufficient funds for sound operation.

(b) The Department shall prescribe and publish such rules and regulations establishing minimum requirements and desirable standards as may be deemed necessary or advisable to carry out the provisions of this act.

(c) Such rules and regulations shall not be made, prescribed, or published until after consultation with the Department of Health and Education, and the State Bureau of Investigation or other agency performing the duties of State Fire Marshall, provided, that not less than sixty (60) days' notice by ordinary mail shall be given to all current licensees before any changes are made in such rules and regulations.

(d) In order to improve the standards of child care, the Department shall also advise and cooperate with the governing bodies and staffs of child care facilities and assist the staffs thereof through advice of progressive methods and procedures and suggestions for the improvement of services.

(e) The Department may participate in federal programs for day care services, enter into agreements or plans on behalf of the state for such purpose, in accordance with the Act of Congress, known as the Public Welfare Amendment of 1962 (Public Law 87-543),[1] or

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[1] 42 U.S.C.A. § 301 et seq.

other federal laws and regulations; and for such purpose, and notwithstanding any other provisions of this act, the Department may approve unlicensed facilities (including private homes) as meeting the standards established for licensing of day care facilities. Foster family homes, group homes, and day care homes which have been selected by and which are supervised by a licensed child care facility, and which meet the standards established for licensing under this act, may be maintained and operated on the basis of permits issued by such child care facility.

Laws 1953, p. 18, § 4. Laws 1963, c. 89, § 4, eff. May 23, 1963.

§ 405. Necessity and issuance of licenses

(a) No child care facility may be operated or maintained after June 30, 1964, unless licensed by the Department; provided, that the Department shall not be required to be licensed, but shall be bound by the standards it prescribes. No new child care facility may be established without the prior approval of the Department which shall be granted only after the Department is satisfied that such facility will meet known needs for the services proposed to be provided and that the facility will meet minimum standards for a license to operate. The incorporation or domestication of a corporation organized for the purpose of operating a child care facility shall not exempt such corporation from compliance with the provisions of this act.

(b) An application for a license shall be made on terms provided by the Department and in the manner

prescribed. Before issuing such license, the Department shall investigate the activities and standards of care of the applicant and if satisfied that the applicant meets the requirements as provided in this act, a license shall be issued. A provisional license may be issued to any applicant whose services are needed but which is temporarily unable to conform to all the rules and regulations of said Department, as provided in Section 4 hereof.[1] All licenses shall be in force for one (1) year from date of issuance unless revoked as authorized by Section 8 of this act,[2] and shall be reissued annually on application, except that a provisional license may be in force for not more than one (1) year unless such emergency exists as, in the discretion of the Department, necessitates an extension thereof.

Laws 1953, p. 19, § 5. Laws 1963, c. 89, § 5, eff. May 23, 1963.

§ 406. Investigations and visitation

The Department shall have authority at any reasonable time to investigate and examine into the conditions of any child care facility in which a licensee hereunder receives and maintains children, and shall have authority at any time to require the facility to provide information pertaining to children in its care. The Department of Health may visit any licensee at the request of the Department to advise on matters affecting the health of children and to inspect the sanitation of the buildings used for their care. The State Bureau of Investigation, or

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[1] Section 404 of this title.

[2] Section 408 of this title.

other agency performing the duties of State Fire Marshal, may visit any licensee at the request of the Department to advise on matters affecting the safety of children and to inspect the condition of the buildings for their care. Information obtained by the Department or Division from any licensee regarding children or their parents or other relatives shall be deemed confidential and privileged communications and shall be properly safeguarded and shall not be accessible to anyone except as herein provided unless upon order of a court of competent jurisdiction.

Laws 1953, p. 19, § 6. Laws 1963, c. 89, § 6, Eff. May 23, 1963.

§ 407. Revocation of license or refusal to renew

The Department may revoke any license of a child care facility, in case the licensee shall have violated any provision of this act or the rules and regulations of said Department, as provided in Section 4 hereof.[1] No license shall be revoked or renewal refused unless the holder of such license shall have been given at least thirty (30) days' notice in writing of the grounds of such proposed revocation or refusal. If such revocation or refusal is protested within thirty (30) days of receipt of said notice by writing addressed to the Commission, said Commission, or its authorized agency, shall conduct a hearing at which an opportunity is given to said licensee to present testimony and confront witnesses. Notice of such hearing shall be given to said licensee by personal service or by delivery to the proper address by registered mail, at least

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[1] Section 404 of this title.

two (2) weeks prior to the date thereof. If notice of the proposed revocation or refusal is not so protested, the license may thereupon be revoked or renewal thereof refused.

Laws 1963, p. 19, § 7. Laws 1963, c. 89, § 7, eff. May 23, 1963.

§ 408. Appeals

(a) Any licensee aggrieved by the decision of the Department under Sections 5 or 7 of this act[1] may, within ten (10) days after the revocation or refusal to issue or renew the license, take an appeal de novo to the district court of the county in which the child care facility is maintained and operated by filing with the clerk of the court a verified petition. Notice of such appeal shall be served on the Director of the Department within five (5) days of the date of its filing.

(b) The Department shall, within ten (10) days of the service of such notice, file with the clerk of said court a transcript of the proceedings had before it. The district court shall thereupon be vested with jurisdiction to hear and determine the questions of law and fact involved, as in an appeal de novo; provided that, if the Department prevails the judgment of the district court shall be that the decision of the Department be affirmed, and if the licensee prevails, the judgment of the court shall be that the revocation be set aside or the license issued or renewed, as the case may be. Pending the hearing of the

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[1] Sections 405, 407 of this title.

appeal, the action of the Department revoking or refusing renewal of the license or the granting thereof shall be stayed. In any action, suit, or proceeding under the act, the Department shall be represented by the Attorney General of the State of Oklahoma.

Laws 1953, p. 20, § 8. Laws 1963, c. 89, § 8, eff. May 23, 1963.

§ 409. Injunction

Any person or child care facility may be enjoined from maintaining and operating such facility for violations of any provisions of this act by suit brought in the name of the state by the Attorney General of Oklahoma or by a district attorney.

Laws 1953, p. 20, § 9. Laws 1963, c. 89, § 9, eff. May 23, 1963.

§ 410. Violations-Punishment

Any person or agent, representative, or officer of any child care facility who violates any of the provisions of this act shall, upon conviction, be deemed guilty of a misdemeanor and punished in accordance with the provisions of 21 O.S.1961, § 10. Whenever any agent, representative, or officer of any child care facility shall be convicted under authority of this act, such conviction shall be sufficient ground for the revocation of the license of said licensee.

Laws 1953, p. 20, § 10. Laws 1963, c. 89, § 10, eff. May 23, 1963.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

(Filed JAN 12 1994)

Wednesday, January 12, 1994

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

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* * *

78,459 Calvary Baptist Church and Reverend Jerry McDonald v. Oklahoma Department of Human Services and Benjamin Demps, Jr., in his capacity as Director of the Oklahoma Department of Human Services.
Certiorari denied.
All Justices concur.

/s/ Ralph B. Hodges
CHIEF JUSTICE

NOT FOR PUBLICATION
IN THE COURT OF APPEALS OF THE
STATE OF OKLAHOMA

DIVISION NO. III

CALVARY BAPTIST CHURCH and REVEREND JERRY MCDONALD,	)	
Appellee,	)	No. 78,459
vs.	)	(Filed July 20, 1993)
OKLAHOMA DEPARTMENT OF HUMAN SERVICES and BENJAMIN DEMPS, JR., in his capacity as Director of the Oklahoma Department of Human Services,	)	
Appellants.	)	

APPEAL FROM THE DISTRICT COURT OF
PITTSBURGH COUNTY, OKLAHOMA

HONORABLE ROBERT A. LAYDEN, JUDGE

REVERSED

John G. Fears,
Assistant General Counsel,
OKLAHOMA DEPARTMENT OF
HUMAN SERVICES,
Oklahoma City, Oklahoma, For Appellants,

David C. Gibbs, Jr.,
GIBBS & CRAZE CO.,
Conneaut, Ohio,

Fred P. Wendel,
LACKEY AND WENDEL,
Eufaula, Oklahoma, For Appellees.

MEMORANDUM OPINION

Opinion by Robert L. Bailey, Judge:

The Oklahoma Department of Human Services and Benjamin Demps, Jr., Director, (collectively, DHS) seek review of the Trial Court's order granting judgment to Calvary Baptist Church and Reverend Jerry McDonald (collectively, Church) in Church's declaratory judgment action, thereby finding Church's children's day care facility primarily educational in purpose and holding Church therefore exempt from DHS licensing requirements for child care facilities. In this appeal, DHS asserts the Trial Court's erroneous application of the exemption claimed by Church.

Church operates a facility known as Calvary Boys Ranch. In 1982, DHS sought to require licensing thereof as a child care facility. Church refused to comply, claiming constitutionally protected religious freedom from licensing. In 1987, the Trial Court issued a permanent injunction against Reverend McDonald enjoining Church from operation of Calvary Boys Ranch unless or until Church obtained a valid child care facility license, and we affirmed on appeal.[1]

Church consequently closed Calvary Boys Ranch on December 22, 1990, but on January 4, 1991, reopened the facility as Calvary Christian Boarding Academy. After inspection thereof, DHS found Church's operation of Calvary Christian Boarding Academy violated the permanent injunction and directed Church to obtain licensing thereof as a child care facility.

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[1] *State ex rel. v. McDonald*, 787 P.2d 466 (Okl.App. 1990).

However, it became apparent to all parties concerned, including the Trial Court, that Church had no intention of obtaining a child care facility license for Calvary Christian Boarding Academy. Taking the initiative, Church filed an action for declaratory judgment, again claiming a constitutional[2] and statutory[3] right to operate without licensure.

After more than two days of hearing, the Trial Court held for Church, finding in pertinent part:

> . . . [T]he wording of 10 O.S. §402(4), exempting facilities that are primarily educational from licensure, is vague and [has] limited application but under the intent of the Statute and under the interpretation that has been given to the wording of the Statute by [DHS] for a long period of time, the court finds that a facility whose purpose is "primarily educational" is exempt from licensure.
>
> . . .
>
> . . . [T]hat Calvary Christian Boarding Academy offers a meager education, has little resemblance to what is commonly known as a school (for example, disdaining what might be considered the hallmark of a school: teachers and books) but still is primarily educational as distinct from Boys Ranch which was primarily rehabilitative.

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[2] Okl. Const., Art. XIII, §§2, 4.

[3] 10 O.S. 1991 §§402, 404.

The Trial Court thus held that Oklahoma statute[4] exempted Church from child care facility licensure. DHS appeals.

The licensing of child care facilities in this state is governed by the Oklahoma Child Care Facilities Licensing Act (Act), 10 O.S. 1991 §§401 et seq. Section 402 of the Act defines a "child care facility" to include "any public or private institution, . . . , day care center or family day care home, providing either full-time or part-time care for children away from their own homes."[5] " 'Full-time care' means continuous care given to a child beyond a minimum period of twenty-four (24) hours."[6] "A 'family day care home' means a *licensed or approved* family home which provides care and protection for five or less children for part of the twenty-four hour day," while "a 'day care center' means a *licensed or approved* facility which provides care and protection for six or more children for part of the twenty-four hour day."[7] However:

> These definitions of family day care home and day care center do not include informal arrangements which parents make independently with neighbors, friends, and others, for caretakers in the child's own home, or nursery schools, kindergartens, or other facilities of which the purpose is *primarily educational,* recreational, or medical treatment.

10 O.S. §402(4). (Emphasis added.)

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[4] *I.e.,* 10 O.S. §402(4).

[5] 10 O.S. §402(2).

[6] 10 O.S. §402(4).

[7] 10 O.S. §402(4).

From our review of §402 of the Act, we find nothing therein exempting a "full-time" child care facility from licensing. That is, the Act grants only limited exemptions from licensing to facilities providing "part-time" care (i.e., a "family day care home" or "day care center" by definition), not for "full-time" child care facilities such as "foster family homes" or "group homes." Stated otherwise, §402 grants an exemption from licensing for "part-time" care facilities, including a "facility of which the purpose is primarily educational," *only* if that facility is a "family day care home" or a "day care center." We therefore find the clear and unambiguous wording of §402(4), as a matter of definition, does not include "full-time" child care facilities in the exemptions from licensing even if that facility is primarily educational in purpose, and hold the Trial Court erred in finding the provisions of §402(4) unenforceably vague.

Moreover, the Legislature expressed the underlying purpose of the Act:

> (a) It is the declared purpose and policy of this act . . . to insure maintenance of minimum standards for the care and protection of children away from their own homes. . . .
>
> (b) In order to provide care for children in child care facilities, a license shall be obtained from [DHS] . . . on the basis of meeting minimum standards which are essential for the health and welfare of the child or children placed for care with such agencies and individuals.

10 O.S. §401.

Section 403 of the Act thus exempts hospitals, maternity homes, schools under the supervision of the Department of Education, and the home of a child maintained by the parent, stepparent or other close relative, while §404 establishes minimum requirements and desirable standards for child care facilities, and §405 mandates licensing for all non-exempt child care facilities. The intent of the statute, then, is to require licensing of child care facilities – subject to specific and enumerated exemptions – in order to insure the care, maintenance, protection, health and welfare of the children of Oklahoma who utilize these facilities.

In the present case, it is uncontroverted that Church's facility provides "full-time care" as defined in the Act, and Church does not claim entitlement to any other statutory exemption. We therefore hold the intent of the statute, as expressed therein, is consistent with requiring licensure of Church's facility.

Lastly, we note the Trial Court found the DHS had interpreted the statute "for a long period of time" as exempting any facility those [sic] purpose is primarily educational. With this finding, DHS vehemently disagrees. Church, for its part, maintains there is no transcript of the hearing or other evidence in the record to support DHS's assertion that it has always viewed the exemption as inapplicable to "full-time care" facilities.

The long standing rule in this jurisdiction establishes:

> [I]nterpretation or construction of an ambiguous or uncertain statute by the agency charged with its administration is entitled to the highest respect by the courts, specially [sic] when the

> administrative construction is definitely settled and uniformly applied for a number of years. In such cases the administrative construction will not be disturbed except for very cogent reasons, provided that the construction so given was reasonable.

Oral Roberts University v. Tax Commission, 714 P.2d 1013, 1014-1015 (Okl. 1985).[8]

We here observe that in the long line of cases adhering to this rule, it was the party protesting the alleged change in interpretation or construction who brought forth evidence of the long-standing, definitely settled and uniformly applied nature of the statute or rule. That is, a party protesting an administrative agency rule or construction of a statute must adduce evidence of a change from long-standing construction to the contrary in order to avail him or herself of the rule enunciated above; in the absence of such evidence, there is no established administrative construction to which the Trial Court is required to defer.[9]

In the present case, there is no evidence in the record adduced by Church that DHS had uniformly and for a number of years exempted "full-time care" facilities whose primary purpose was educational from licensing requirements. Rather, Church relies on the testimony of

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[8] *See, also, Tulsa Tribune Co. v. State ex rel. Oklahoma Tax Commission*, 768 P.2d 891 (Okl. 1989); *Mazzio's Corp. v. Oklahoma Tax Commission*, 789 P.2d 632 (Okl.App. 1989); *Oklahoma Tax Commission v. Liberty Nat'l Bank & Trust Co.*, 289 P.2d 388 (Okl. 1955).

[9] *See Oral Roberts University*, 714 P.2d at 1013.

the DHS Licensing Unit Programs Administrator, transcribed portions of which are included in the record by Church, to support it [sic] position. However, we find this testimony consists of mere opinions in response to hypothetical questions[10] and does not establish actual longstanding construction and application of the statute by DHS contrary to its present position.

Second, the Trial Court based its finding of a longstanding interpretation by DHS on a previous finding that the language in the present statute was vague. Having found the statute in the present case clear and unambiguous, we hold the rule requiring deference to longstanding administrative construction or interpretation of ambiguous or unclear statutes inapplicable. Accordingly, we reject this proposition.

Under these facts and circumstances, and in view of the clear and unambiguous language of §402 of the Act, we hold the Trial Court erred in granting judgment to Church, thereby holding Church's Calvary Christian Boarding Academy not subject to the prior injunctive order, or the licensing requirements of the Act. The order of the Trial Court to that effect is therefore REVERSED.

HUNTER, P.J. and GARRETT, J. concur.

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[10] Many of these hypothetical questions and answers form the basis of Church's main argument; i.e., that the phrase "primarily for educational purpose" is undefined in the statute and is, thus, vague and ambiguous. However, and as noted herein, the exemption for a facility whose primary purpose is educational does not apply to a "full-time care" facility such as Church's. We therefore decline to address further the merits of this argument.

IN THE DISTRICT COURT IN AND FOR
PITTSBURG COUNTY
STATE OF OKLAHOMA

Calvary Baptist Church and Reverand [sic] Jerry McDonald, Plaintiff,	)	
v.	)	C-91-222
Oklahoma Department of Human Services and Benjamin Dempts, Jr., in his capacity as Director of the Oklahoma Department of Human Services, Defendants,	)	

ORDER

This is a Civil action brought by plaintiff seeking a Declaratory Judgment and other equitable relief against the defendants. The case was heard on July 24 through July 26, 1991, the plaintiffs appearing by their attorneys Mr. Daniel Loomis and Mr. David Gibbs, and the defendants appearing by their attorney Mr. John Fears. The parties were given time to submit briefs to the court, the last brief received on September 13, 1991.

In a prior action this court issued a permanent Injunction against Reverand [sic] Jerry McDonald and Calvary Boys Ranch prohibiting them from operating a Child Care Facility within the State of Oklahoma without first obtaining a license from the Oklahoma Department of Human Services. After appellate review, the plaintiffs complied with said order and closed the Boys Ranch December 22, 1990; the church expanded Calvary Christian Academy and began a Boarding Academy on January

4, 1991. The Department of Human Services notified plaintiff that it was in violation of the court's Injunctive Order and directed that operation of the Boarding Academy cease. The plaintiff's filed this action for Declaratory Judgment asking the court to determine that the prior Injunction of the court does not apply to the Calvary Christian Boarding Academy and to declare that the Calvary Christian Academy does not require a license from the Department of Human Services.

It is the contention of the plaintiffs that Calvary Christian Boarding Academy is a substantially different institution from Calvary Boys Ranch, that it is exempt from licensure by virtue of being under the supervision of the Department of Education and that it is exempt from licensure by an exception in the Statute for instutions that are primarily eduactional. Plaintiffs also contend that attempts to force the Academy to obtain a license violates plaintiffs right to equal protection and due process of law. Defendants contend that the Academy is not substantially different from the Calvary Boys Ranch and is therefore subject to the prior Injunction of the court; that the Academy is not primarily educational and is not under the supervision of the Department of Education. Defendants conclude that the Court should declare that the plaintiffs must obtain a license from the Department of Human Services before they can operate the Academy.

I

Title ten (10) Oklahoma Statutes section 403 (a), provides that the Child Care Licensing Act shall not apply to

schools under the supervision of the Department of Education. The Court finds that the plaintiffs have not applied to the Department of Education for supervision;, they have not sought to be accredited under the standards of the Department of Education and the Court finds that no testimony or evidence was submitted to show that the Academy is in any way under the supervision of the Department of Education. The Court holds as a matter of law that the plaintiffs, particularly the Academy, are not subject to the supervision of the Department of Education.

II

Findings of Facts

1. The Court finds that Calvary Baptist Church is a religious institution operating exclusively for religious purposes, that prior to the order of the Court it operated Calvary Boys Ranch as a ministry of the church and that it was a full time Child Care Facility; that Calvary Boys Ranch offered training and education through a private educational corporation called Accelerated Christian Education, Inc. (hereinafter called ACE).

2. That after the Boys Ranch closed operations the Church opened the Academy in early January, 1991, and that all of the minor residents of the former Calvary Boys Ranch re-enrolled in the Academy and continued to reside in the same building on the Ranch property.

3. The Court finds that the Academy was later conducted in a new facility located at the Church property in Eufaula, that a college preparatory program was made

available to students, that rules of attendance and rules of leaving the Academy were substantially different from those at the Ranch; that the Church sought to change the student body from hard core deliquents [sic] to more disciplined, emotionally stable students.

4. The Court finds that the plaintiffs sought to change the nature of their institution from one that was primarily involved in rehabilitation to one primarily involved in education.

5. The Court finds that the Academy retained characteristics of the Ranch and that it kept the same student body, that the same classroom materials from ACE were still being utilized, that the student body was involved in a self instructional program and studied in cubicles that were new but were almost identical to the ones used in the prior classrooms, that all grades continued to be taught in one room, that the school was not accredited by the State of Oklahoma Board of Education, that the school had no State certified teachers, that most instruction was to be provided by "monitors" who were without training or education in teaching except for a one week course with the ACE program, that no provision was made for special education, that the Library was extremely limited, that no Laboratories were provided for scientific courses, that the general concept of the Academy was similar to that of the Ranch in that it preserved a western motif in clothing (e.g. cowboy boots) and emphasized education in horsemanship.

6. The Court finds that there is no definition of the term "primarily educational" as it is used in the Statute.

7. The Court finds that Title 10 section 404 (a), provides that child care facilities are required to comply with certain minimum requirements which includes "full educational and religious opportunities. . . . "

8. The Court finds that the Oklahoma Child Care Facilities Licensing Act is for the purpose of insuring maintenance of minimum standards for the care and protection of children away from their own homes and that licenses should be required of Child Care Facilities so that the Department of Human Services can insure that minimum standards essential for health and welfare of children are maintained. Title 10 Section 401.

9. The Court finds that pursuant to Title 10 O.S. Section 402, a Child Care Facility means any public or private institution providing either full time or part time care for children away from their homes; that full time care means continuous care given to a child beyond a minimum period of 24 hours. The Court finds that under Section 402, a Child Care Facility is required to obtain a license from the Department of Human Services. The Court finds that Section 402, Paragraph 4, provides: "these definitions of family day care home and day care center do not include . . . other facilities of which the purpose is primarily educational, recreational, or medical treatment."

10. The Court finds that the wording of 10 O.S. 402 (4), exempting facilities that are primarily educational from licensure, is vague and would seem to have limited application but under the intent of the Statute and under the interpretation that has been given to the wording of the Statute by the Department of Human Services for a

long period of time, the Court finds that a facility whose purpose is "primarily educational" is exempt from licensure.

11. The Court finds that the Calvary Baptist Church is primarily a religious facility and that it is the belief of the plaintiffs that the primary need of children entrusted to their care is spiritual; the Court finds this is not inconsistent with the Church operating a school that is primarily for educational purposes, particularly in providing a christian education.

12. The Court finds that certain arguments raised by the Attorneys are not at issue in this case, particularly: (A) Plaintiff's right to an exception from licensure based on its religious ministry as that was decided in the prior suit; (B) Plaintiff's right to privacy and the right of parents to send their children to religious or educational facilities of their choice, as that issue was determined in the prior suit; (C) The failure of the Department of Human Services to license other similarly situated educational institutions; the Court finds it is fairly obvious that a college remains primarily educational and does not become a child care facility because of the possibility of a student under the age of eighteen being in one of its dormitories.

13. The Court finds that the Department of Human Services is not acting arbitrarily and capriciously in failing to require licenses of public and private schools that are under the supervision of the Department of Education as a specific exemption is provided in 10 O.S. Section 403.

14. The Court finds that the Department of Human Services does not have clear directives to distinguish

between a Child Care Facility that provides education from an Educational Facility that provides child care; that a standard that is subjective and based on the knowledge and personal experience of a particular employee is not acceptable.

15. The Court finds that Calvary Christian Boarding Academy offers a meager education, has little resemblance to what is commonly known as a school (for example, disdaining what might be considered the hallmark of a school: teachers and books) but still is primarily educational as distinct from the Boys Ranch which was primarily rehabilitative.

III.

Conclusions of Law

1. The Court holds that the Calvary Christian Boarding Academy is primarily educational. The Court holds that where an institution is primarily educational, the fact of incidental caring for, feeding and providing for minor children does not necessarily make it a child care facility; The Court holds that furnishing some educational programs does not necessarily make a child care facility primarily educational.

2. The Court holds that Title 10 O.S. Section 401, declares the policy of the licensing provisions to be the protection of children away from their own homes, that this is an extremely important function of the State and that Statutes must be interpretated [sic] to carry out the intention of the Legislature.

3. The Court holds that the exemption from licensure for facilities that are primarily educational, recreational or for medical treatment is to avoid duplication with facilities or institutions that are supervised by other Departments of Government.

4. The Court holds that under Title 10 Section 404, a child care facility is required to offer full educational and religious opportunities; that offering minimal educational opportunities, without teachers and other standard educational tools, does not change a child care facility to a facility that is primarily educational.

5. The Court holds that the wording of Title 10 Section 402, with regard to facilities the purpose of which is primarily educational recreational or for medical treatment creates an exemption from licensure by the Department of Human Services.

6. The Court holds that the Statute fails to set up standards or definitions for the determination of what is an educational facility; that this permits a basically child care facility to avoid licensure by the Department of Human Services, and to some extent avoid the supervision and scrutiny of public officials and to avoid meeting minimum requirements set by the State for the protection of children. The Court holds that there is a gap in the law which should be corrected but should not be corrected by a "Statute" written by a Trial Judge.

7. The Court holds that the Calvary Christian Boarding Academy is a facility established primarily to provide for the spiritual needs of its students by offering a Christian Education; that the Calvary Christian Boarding Academy meets the Statutory requirements of being

primarily an educational facility that incidentally sees to the physical care of its students.

ORDER

It is the Order of this Court that Plaintiffs' request for a Declaratory Judgment is granted and the Court declares that the Calvary Christian Boarding Academy is not subject to the prior Injunctive Order of this Court; the Court declares that under the Child Care Facilities Licensing Act of the State of Oklahoma the Calvary Christian Boarding Academy is not required to obtain a license from the Department of Human Services before it can operate in this State.

DATED THIS 19th DAY OF SEPTEMBER, 1991.

/s/ Robert A. Layden
ROBERT A. LAYDEN,
DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUN 6 1994
OFFICE OF THE CLERK

No. 93-1609

In The

Supreme Court of the United States

October Term, 1993

REV. JERRY McDONALD and
CALVARY BOYS RANCH,

Petitioners,

v.

OKLAHOMA DEPARTMENT OF HUMAN SERVICES
and BENJAMIN DEMPS, JR.
in his capacity as the Director,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondents reject the Petitioners' characterization of the questions presented. The following questions regarding jurisdiction should be initially considered:

1. Whether Petitioners failed to present its current First Amendment claim under the Free Exercise Clause or Fourteenth Amendment due process analysis to the state court of last resort, the Oklahoma Supreme Court, thereby precluding jurisdiction under 28 U.S.C. § 1257(a)?

2. Whether the Petitioners asserted a claim under the Free Exercise Clause involving this state statute, 10 Okla. Stat. § 401, *et seq.* in a prior Petition to this Court, and, therefore, is precluded from rearguing such claim in this appeal?

PARTIES TO THE PROCEEDINGS

The Respondents named in the Petition should be modified by substitution of a successor official. Benjamin Demps, Jr. has been replaced by George Miller as Director of the Oklahoma Department of Human Services.

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No. 93-1609

In The

Supreme Court of the United States

October Term, 1993

REV. JERRY McDONALD and
CALVARY BOYS RANCH,

Petitioners,

v.

OKLAHOMA DEPARTMENT OF HUMAN SERVICES
and BENJAMIN DEMPS, JR.
in his capacity as the Director,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

BRIEF IN OPPOSITION

OPINIONS DELIVERED IN STATE COURTS BELOW

The opinions rendered by subordinate courts and cited by Petitioners are correct, and are contained in the Petitioners' Appendix. An additional Memorandum Opinion, however, dated June 20, 1989, by the Oklahoma Court of Appeals is relevant to jurisdiction over a constitutional claim. *State of Oklahoma ex rel. Don Roberts District Attorney v. Rev. Jerry McDonald, et al.*, 787 P.2d 466 (Okl.App. 1989) (*McDonald* I), involved Petitioners' previous unsuccessful challenge against the Oklahoma Child Care Facilities Licensing Act, 10 O.S. § 401, *et seq.*, as

violative of rights under the Free Exercise Clause of the First Amendment.

JURISDICTION

As discussed in detail in the following sections, petitioners have failed to present a Free Exercise Clause claim under the First Amendment or Fourteenth Amendment due process analysis regarding 10 Okla. Stat. § 401, *et seq.*, (hereinafter, the "Act") against licensure of petitioners' residential facility for children, to the state court of last resort. Thus, there is no final decision on those questions that is reviewable under 28 U.S.C. § 1207(a).

Petitioners previously sought a Writ of Certiorari before this Court in No. 89-1881 based upon the Free Exercise Clause and challenged the requirement of licensure under the above Statute. Following a dismissal of the appeal of *McDonald* I as untimely by the Oklahoma Supreme Court, this Court denied a Writ of Certiorari. *State of Oklahoma v. McDonald, et al.*, 498 U.S. 817 (1990). Consequently, the doctrine of *res judicata* bars review of petitioners' First Amendment claim under any basis.

STATUTORY PROVISIONS

§ 401. Purpose and policy of law-Minimum standards

> (a) It is the declared purpose and policy of this act, same to be known as the "Oklahoma Child Care Facilities Licensing Act," to insure maintenance of minimum standards for the care

and protection of children away from their own homes, to encourage and assist the child care facility toward maximum standards, and to work for the development of sufficient and adequate services for child care through joint work of public and voluntary agencies. Whenever possible, child care facilities should help to preserve and restore family life for children.

(b) In order to provide care for children in child care facilities, a license shall be obtained from the Department of Public Welfare, which is issued on the basis of meeting minimum standards which are essential for the health and welfare of the child or children placed for care with such agencies and individuals.

STATEMENT OF THE CASE

The Petitioners' Statement of the Case omits discussion of orders and pleadings relevant to the jurisdiction of this Court to hear the instant petition. Respondents, therefore, submit the following statement.

1. It is correct that an injunction was issued on September 22, 1987, under Section 409 of the Act (See Pet. App., at 17), against petitioners' operation of their 24 hour full-time residential facility for children formerly known as Calvary Boys Ranch. Petitioners had refused to apply for a license alleging that the mere act of licensure violated their rights under the Free Exercise Clause.

2. The injunction was upheld by the Oklahoma Court of Appeals in *McDonald* I, *supra*, and the Free Exercise Clause argument was rejected. Petitioners'

appeal of *McDonald* I to the Oklahoma Supreme Court was dismissed on February 21, 1990 as untimely (*See* No. 89-1881; Pet. App., at 9). As noted in the jurisdictional statement above, this Court denied review on November 18, 1990. *State of Oklahoma v. McDonald, et al.*, 498 U.S. 817 (1990). The state court injunction, therefore, continued in full force and effect.

3. Following Christmas vacation, the residential facility reopened on January 4, 1991, under the name Calvary Christian Boarding Academy. Since petitioners again refused to apply for a license, the Oklahoma Department of Human Services notified Rev. Jerry McDonald that he was in violation of the injunction. Petitioners then filed a declaratory judgment action asking the trial court to determine their residential facility exempt from licensure as being "primarily educational" in purpose under 10 Okla. Stat. § 402(4) of the Act. Although rejected by the trial court, petitioners also claimed to be exempt under Section 403(a) of the Act as being supervised by the State Department of Education.

4. Although finding Section 402(4) vague, petitioners alleged right to an exemption from licensure based upon the Free Exercise Clause was rejected by the trial court (Pet. App., at p. 32, para. 12). However, the Free Exercise Clause argument was neither presented to, nor considered by, the Oklahoma Court of Appeals in *McDonald* II (Pet. App., at 19). Most importantly, neither the First Amendment Claim, nor the Fourteenth Amendment due process analysis was presented to the Oklahoma Supreme Court in petitioners' Amended Petition for Certiorari (Resp. App., at 1-5).

5. The Oklahoma Court of Appeals in *McDonald* II reversed the trial court holding that the "primarily educational" licensure exemption was vague and unenforceable. The appellate court held that the exemption language was clear and unambiguous, applied only to "part-time" care, and not a "full-time" residential facility such as the one operated by petitioners. The Oklahoma Court of Appeals explicitly found:

> " . . . the clear and unambiguous wording of § 402(4), as a matter of definition, does not include 'full time' child care facilities in the exemptions . . . even if that facility is primarily educational in purpose, . . . "

(Pet. App., at 23)

The appellate court further noted the expressed purpose of the state statute as set forth in 10 Okla. Stat. § 401:

> "(a) It is the *declared purpose* and policy of this act . . . *to insure* maintenance of *minimum standards for the care and protection of children away from their own homes* . . .
>
> (b) . . . a license shall be obtained from [DHS] on the basis of meeting minimum standards which are essential for the health and welfare of the child or children placed for care with such . . . individuals." (emphasis added)

The appellate court then held licensure of petitioners' facility consistent with the intent of the Statute. The Oklahoma Supreme Court denied a petition for writ of certiorari. Pet. App., at 18.

THE COURT SHOULD DENY THE PETITION

A. THIS COURT LACKS JURISDICTION TO REVIEW PETITIONERS' FIRST AMENDMENT CLAIM OR FOURTEENTH AMENDMENT DUE PROCESS CLAIM SINCE NEITHER WAS PRESENTED TO THE STATE COURT OF LAST RESORT.

Petitioners' attempt to seek review of the "primarily educational" exemption in Section 402(4) of the Act via an alleged claim under The Free Exercise Clause of the First Amendment argued in conjunction with a Fourteenth Amendment due process analysis is jurisdictionally defective. This is true with regard to Petitioners' instant Petition as it was in their prior attempt at review in Case No. 89-1881. Simply stated, there is no final decision to review.

In order for this Court to hear the Petitioners' constitutional claims, such arguments must be presented to the state court of last resort for a "final" decision. 28 U.S.C. § 1207(a). In this instance, petitioners failed to present any such claims or arguments to the Oklahoma Supreme Court following *McDonald* II (Resp. App., at 1-5). Thus, the Petition herein must be denied. *Webb v. Webb*, 451 U.S. 493, 495 (1981).

It should be noted that even the Oklahoma Court of Appeals did not rule upon such federal constitutional claims in *McDonald* II. Petitioners cannot, however, invoke discretionary review without presenting such arguments "to the last state court in which a decision of that question could be had." *Gotthilf v. Sills*, 375 U.S. 79, 80 (1963). Under Rule 3.13, Oklahoma Rules on Practice

and Procedure in the Court of Appeals and on Certiorari to that Court, the Oklahoma Supreme Court is the court of last resort.

B. RES JUDICATA PRECLUDES REVIEW OF PETITIONERS' FIRST AMENDMENT CLAIM.

Respondents have referred to a prior decision by the Oklahoma Court of Appeals in the Statement of the Case. That Memorandum Opinion, referred to above as *McDonald* I, addressed petitioners' alleged First Amendment claim against the licensure requirement of the Act. *McDonald* I became final upon the subsequent dismissal of petitioners' appeal as untimely by the Oklahoma Supreme Court in 1990. (Pet. App., at 9). As previously noted, this Court denied review of *McDonald* I in *State of Oklahoma v. McDonald, et al.*, 498 U.S. 817 (1990).

The doctrine of *res judicata*, therefore, precludes reconsideration of petitioners' Free Exercise Clause claim against licensure in the instant petition. *Clark v. Haas Group, Inc.*, 953 F.2d 1235 (10th Cir. 1992). Although petitioners argued to the Court of Appeals in *McDonald* II that Section 402(4) is too vague in defining the "primarily educational" exemption from licensure, the claim is identical in both appeals in that petitioners alleged licensure violates their religious rights under the First Amendment.

Even if petitioners had presented such a claim to the Oklahoma Supreme Court following *McDonald* II, *res judicata* bars review by this Court under any circumstances. Petitioners failed to timely present that argument to the Oklahoma Supreme Court after the Oklahoma Court of Appeals decision in *McDonald* I and are bound by that

ruling. There is no jurisdiction to hear the claim, and review should be denied.

C. SECTION 402(4) OF THE ACT DOES NOT APPLY HERE

The Oklahoma Court of Appeals properly held that the "clear and unambiguous wording of Section 402(4)" does not exempt a full-time residential facility for children such as Calvary Christian Boarding Academy. The intermediate appellate court pointed out that such an interpretation was in full accord with the explicit purpose of the Act under Section 401(a) to:

> " . . . insure maintenance of minimum standards for the care and protection of children away from their homes . . . "

It is uncontroverted that minor children reside in Petitioners' facility twenty-four hours a day away from their homes and parents. Indeed, many are from out of state. They are cared for and supervised by unrelated adults. There is no dispute that petitioners operate a full-time facility as opposed to part-time.

Section 402(a) of the Act provides that "full time" care is:

> " . . . continuous care given to a child beyond a minimum of 24 hours."

There are no exemptions for full-time care. As the appellate court opined in *McDonald* II, Section 402(4) provides exemptions only for "part-time" care. Even if petitioners' facility could qualify as primarily educational in purpose,

it is not a parttime (less than 24 hours per day) operation. Although other exemptions exist for facilities that are licensed by other agencies, petitioners do not claim and are not entitled to such exemptions. *See* Section 403 (Pet. App., at 10).

The Court of Appeals was correct in *McDonald* II in analyzing Section 402(4) in conjunction with the Act's stated purpose of protecting children away from their homes. Obviously, states have a compelling interest in adopting *minimum* standards to protect the health and welfare of children residing full-time with unrelated adults away from their parents or guardians.

Even if one assumes that petitioners may present a Fourteenth Amendment due process argument, petitioners cannot qualify for the disputed exemption since they are not a "part-time" facility. Thus, the dictates of this Court concerning vagueness do not apply under these facts. Petitioners' reliance upon *Grayned v. City of Rockford*, 408 U.S. 104 (1972) is misplaced since petitioners do not qualify as a part-time facility.

Since neither the First Amendment, nor any other federal constitutional or statutory claims are involved, references to *Smith v. Goguen*, 415 U.S. 566 (1974) and *NAACP v. Button*, 371 U.S. 415 (1963) are similarly not applicable.

CONCLUSION

This Court should deny certiorari in this case based upon the foregoing arguments.

Respectfully submitted,

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APPENDIX 1

IN THE SUPREME COURT FOR THE STATE OF OKLAHOMA

CALVARY BAPTIST CHURCH and REVEREND JERRY MCDONALD,	)	
Petitioners,	)	No. 78,459
vs.	)	
OKLAHOMA DEPARTMENT OF HUMAN SERVICES and BENJAMIN DEMPS, JR., in his capacity as the Director of the Oklahoma Department of Human Services,	)	
Respondents.	)	

AMENDED PETITION FOR CERTIORARI TO THE OKLAHOMA SUPREME COURT

COME NOW Petitioners Calvary Baptist Church and Reverend Jerry McDonald, Petitioners in this case, and, pursuant to 20 O.S. 1971 § 30.1, and Rule 3.13, Rules on Practice and Procedure in the Court of Appeals and on Certiorari to that Court, hereby respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals, Division III, State of Oklahoma, made in this proceeding on July 20, 1993.

The opinion has not been published in the Oklahoma Bar Association Journal. Therefore a copy of the court of Appeals' Memorandum Opinion in No. 78,459, *Calvary Baptist Church and Reverend Jerry McDonald v. Oklahoma Department of Human Services and Benjamin Demps*, is appended hereto. The date of the decision for which

Petitioners seek review is July 29, 1993. Denial of Petition for Rehearing was filed July 5, 1993.

REASONS FOR GRANTING WRIT

The Oklahoma Supreme Court has never decided whether a boarding school facility which is primarily educational is subject to the jurisdiction of the Department of Human Services.

STATEMENT OF FACTS

Petitioners seek review of decision of the Court of Appeals, Division III, which reversed a Trial Court Order granting judgment to them in the Church's declaratory judgment action, thereby finding the Church's boarding academy primarily educational in purpose and holding the Church exempt from DHS licensing requirements for child care facilities.

In 1987, Reverend Jerry McDonald and Calvary Baptist Church were enjoined from operating Calvary Boys Ranch, a child-care facility according tot he courts, until the Boys Ranch obtained a child care license from the Department of Human Services. After all reviews of this decision had been completed, the Church closed the Boys Ranch on December 22, 1990. On January 4, 1991, a new facility, this time a boarding school, Calvary Christian Boarding Academy, was opened.

The Trial Court found that " 'Calvary Christian Boarding Academy . . . is primarily educational as distinct from the Boys Ranch which was primarily rehabilitative.' " *Calvary Baptist Church v. Oklahoma Department of*

Human Services, No. 78,459, slip op. at 2. The Trial Curt also found that the wording in 10 O.S. §402(4), exempting facilities that are primarily educational from licensure, is " 'vague and [has] limited application but under the intent of the Statute and under the interpretation that has been given to the wording of the Statute by [DHS] for a long period of time, . . . a facility whose purpose is "primarily educational" is exempt from licensure.' "

The Trial Court then concluded that "where an institution is primarily education, the fact of incidental caring for, feeding and providing for minor children does not necessarily make it a child care facility" and that "the wording of Title 10 Section 402, with regard to facilities the purpose of which is primarily educational, recreational or for medical treatment creates an exemption from licensure by the Department of Human Services." Further, the Trial court held that

> the Statute fails to set up standards or definitions for the determination of what is an education facility; that this permits a basically child care facility to avoid licensure by the Department of Human Services, and to some extent avoid the supervision and scrutiny of public officials and to avoid meeting minimum requirements set by the State for the protection of children. The Court holds that there is a gap in the law which should be corrected but should not be corrected by a "Statute" written by a Trial Judge.

Therefore, it was the Order of the Trial Court that

> Calvary Christian Boarding Academy is not subject to the prior Injunctive Order of this Court; the Court declares that under the Child Care

> Facilities Licensing Act of the State of Oklahoma the Calvary Christian Boarding Academy is not required to obtain a license from the Department of Human Services before it can operate in this State.

The Department appealed that decision and the Court of Appeals reversed, holding that "primarily educational" exclusion of 10 O.S. § 402(2) was limited only to facilities providing "part-time" care, not "full-time" care facilities. Therefore, Calvary Christian Boarding Academy must be licensed by the Department, because, according to the Court of Appeals, the Boarding Academy offers "full-time care" as defined in the Act.

ARGUMENT

The only thing that is defined in the Act is "part-time" and "full-time." Not surprisingly, "part-time" means less than a full day, "full-time" means a full day. "Care" is not defined. May the facility be both a primarily educational institution *and* a primarily care-giving one? The law does not specifically address that question. Therefore, the Trial Court was not in error in concluding that there is a gap in that law.

The Church contends, and the trial court agreed, that it is providing primarily education to the students enrolled in the Boarding Academy, and is not primarily a caregiver. If you will, it is not a "full-time" care-giver. Neither is a hospital – primarily a medical treatment facility – which also incidentally provides care to children within its walls, a "full-time" care-giver. Neither should

be subject to the licensing requirements of the Department of Human Services.

The law gives no guidelines to direct the Department in determining whether the services being given by a facility is "care" or "education" under the terms of the Statute. There is a gap which may need to be filled. However, it is not the province of a court to write a statute to fill a gap left by the Legislature. It was error for the Court of Appeals to have done so.

ARGUMENT

The Court of Appeals was in error in filling the gap in the Child Care Facilities Licensing Act, taking on itself the role of the Legislature. While a gap may exist, it is not the province of the judicial system to fill it. This substantial question has never before been determined by the Supreme Court. Petitioners therefore respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Comes now the undersigned and hereby certifies that the foregoing Amended Petition for Certiorari to the Oklahoma Supreme Court has been served upon opposing counsel John G. Fears, Department of Human Services, P.O. Box 53025, Oklahoma City, Oklahoma 73152-3025, by placing a copy in the United States Express Mail, return receipt requested, on November 12th, 1993.

/s/ Fred P. Wendel